No. 17-269

In the Supreme Court of the United States

STATE OF WASHINGTON,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE LAW PROFESSORS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

Amici curiae, listed in the Appendix, are law professors who teach and write in the areas of property, natural resources, and federal Indian law. They file this brief to explain the development of English common law rules preventing persons from erecting artificial obstructions in navigable and non-navigable waterways. Such obstructions were actionable if they precluded fish from swimming upstream, thereby disrupting the rights held by the general public and/or private property holders to harvest those fish.

This common law prohibition on obstruction of waterways was incorporated, with only slight modifications, by federal, state and local governments throughout the United States. Indeed, it formed the basis of court decisions and legislation in the eighteenth and nineteenth centuries that conditioned the erection of mills, dams, and other artificial structures on assurance of reasonable fish passage. The amici curiae have an interest in ensuring that this information, which is entirely absent from the briefs submitted by the Petitioner and its amici curiae, is available to the Court.[1]

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[1] No counsel for any party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this amicus brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the 1850s, the United States entered into a series of treaties with Indian tribes in the Pacific Northwest. In these treaties, the tribes agreed to cede large swaths of land to the United States. *See, e.g.*, Treaty of Point-No-Point, art. I, 12 Stat. 933, 934 (1855). In exchange, however, they demanded assurances that they could continue to take fish within the territory they were ceding. Fish "were not much less necessary to the existence of the Indians than the atmosphere they breathed." *United States v. Winans*, 198 U.S. 371, 381 (1905). They were important not only for subsistence and commercial purposes; fish were an integral part of tribal culture and religion. *United States v. Washington*, 384 F. Supp. 312, 350 (W.D. Wash. 1974) (noting that "one common cultural characteristic among all of these Indians was the almost universal and generally paramount dependence on . . . anadromous fish," which were "vital to the Indian diet, played an important role in their religious life, and constituted a major element of their trade and economy").

The federal government acceded to this Tribal demand. Governor Isaac Stevens, the lead negotiator for the United States, stood before tribal representatives, holding the treaty, and promised them that "[t]his paper secures your fish." *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 667 n.11 (1979) (hereinafter *Fishing Vessel*). As signed and ratified, these treaties explicitly stated that "[t]he right of taking fish, at all usual and accustomed grounds and stations, is further

secured to said Indians in common with all citizens of the Territory." *See, e.g.*, Treaty of Point-No-Point, art. IV, 12 Stat. 933, 934 (1855).[2]

But for these treaties, the State of Washington would not exist. Yet the Tribes are no longer secured in their fisheries. The State has built numerous roads that traverse waterways within the ceded territory. Underneath those roads it has constructed culverts that allow the water to continue to flow. The State readily admits that many of these culverts completely obstruct the passage of fish upstream. Pet. Br. at 19. In fact, within the ceded territory, there are more than 800 culverts that block fish passage. *Id.* This is particularly problematic for anadromous fish such as salmon, because of their life cycle. They hatch in fresh water rivers, migrate to the ocean where they remain for most of their life, and return to their fresh-water place of origin to spawn. *Fishing Vessel*, 443 U.S. at 662. Blocking their passage prevents them from entering the ocean as juveniles and from reaching their spawning grounds as adults.

Lower federal courts concluded that these culverts violated the Tribes' treaty rights and must be removed. The State argues, however, that these decisions have created an "extraordinarily broad new treaty right" that "has no basis in . . . history or precedent" and is

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[2] Since federal negotiators used the Chinook jargon, a trade language limited to only 300 words, it would have been hard to precisely translate this provision. *Fishing Vessel*, 443 U.S. at 667, n.10. Instead, as this Court has previously noted, the Indians "were invited by the white negotiators to rely on and in fact did rely heavily on the good faith of the United States to protect [their fishing] right." *Id.* at 667.

"unworkable." Pet. Br. at 27, 35. It claims that both the United States and the Tribes "assumed that guaranteeing access to usual and accustomed fishing places would suffice to guarantee the Tribes' access to salmon," and that this assumption was "mistaken;" in other words, since the "impact of development on salmon" is not something that the parties specifically contemplated, no such right exists. *Id.* at 35. The State also asserts that it should have an equitable defense, because the federal government granted permits enabling the construction of the culverts in the first place. *Id.* at 29.

The State is supported by amici curiae Association of Washington Business et. al. ("AWB"), which argues in its brief that the Tribes' treaty right only provided Tribal members with the opportunity to fish, because "[a]t common law, fishing rights were understood to be interests in real property tied to particular locations, not rights in the fish themselves." AWB Br. at 5, 9. Citing William Blackstone's *Commentaries on the Laws of England* (1766) and James Kent's *Commentaries on American Law* (1828), AWB claims that fish are wild animals, and a property interest in them could only be acquired by possession. *Id* at 5, 10. The treaty right retained by the Tribe was thus supposedly nothing more than the common law right of the public to fish in navigable waterways, a right that could be regulated by the State pursuant to the public trust doctrine. *Id.* at 10. Reviving the oft-argued and routinely rejected "equal opportunity" argument,[3] AWB concludes that

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[3] Throughout the twentieth century, the State argued that the treaty right granted the Tribes' nothing more than the rights State citizens enjoy in the fishery. This Court has repeatedly rejected

interpreting the treaty right in this manner would not render it meaningless, because it guaranteed the Tribes the right to fish off-reservation in the same manner as all other citizens of the territory. *Id.* at 11.

The arguments advanced by the State and its amici curiae are rather remarkable because they would actually guarantee tribes *fewer* rights than even private individuals had at treaty times. The prohibition on blocking fish passage was well-established in Anglo common law. No less a document than the Magna Carta embodied the barons' demand that "[a]ll fish-weirs shall be removed from the Thames, the Medway, and throughout the whole of England, except on the sea coast." Magna Carta ¶ 33 (1215). By the 1850s, when Governor Stevens was negotiating with the Pacific Northwest tribes, English law was clear that it was illegal "to obstruct the passage of fish into the upper fishery," particularly if it was prejudicial to those with downstream fishery rights. *See, e.g.*, Humphrey W. Woolrych, *A Treatise of the Law of Waters* 170-71 (1853) ("the state or condition of a fishery low down a stream, cannot be so altered as

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this argument. In doing so, it has prohibited the State from licensing fish wheels and implied an easement across all land – both public and private – as necessary to ensure that Indians are not excluded from their fishery. *Winans*, 198 U.S. at 380-81. It has prohibited the State from charging tribal members a license fee when exercising their treaty rights. *Tulee v. Washington*, 315 U.S. 681, 685 (1942). It has precluded enforcement of discriminatory State regulations that favor sports fisherman over tribal subsistence fisherman. *Dep't of Game of Washington v. Puyallup Tribe*, 414 U.S. 44, 48 (1973). And it has held that the treaty right guarantees Indian tribes up to one-half of the harvestable fish at their usual and accustomed places. *Fishing Vessel*, 433 U.S. at 684-87.

to obstruct the passage of fish into the upper fishery, especially if it be done in such a manner as may be prejudicial to the fair exercise of the right of catching fish in the lower fishery"); *see also Weld v. Hornby*, 103 Eng. Rep. 75, 7 East 196 (K.B. 1806) (declaring stone weir a public nuisance because it blocked the passage of fish upstream); *Parker v. People*, 111 Ill. 581, 591-92 (1884) (noting that more than 30 acts of parliament forbade obstructions that prevented fish from swimming upstream).

The U.S. states adopted the prohibition on obstructing fish passage from the very beginning. *E.g.*, Joseph K. Angell, *Treatise on the Law of Watercourses* 82-83 (5th ed. 1854) ("The right of several fishery is clearly limited to the right of taking fish, and does not carry with it the right to hinder the passing of them above, and of preventing the suprariparian proprietors from enjoying a similar privilege"). They did so both through common law nuisance doctrines and statutory prohibitions. *E.g., Boatright v. Bookman*, 1 Rice 447 (S.C. Ct. App. 1839) (noting that obstructions to the passage of fish may constitute a public or private nuisance, and describing an 1827 Act passed to prevent such on specific rivers).

Both legislation and common law also authorized exactly the remedy ordered by the courts below: that the offending obstacle be modified or removed. Legislation established fish committees authorized to inspect obstructions and ensure that fish passage was maintained. Such committees were empowered to order that remedial actions be taken, and if necessary, enter private property and tear down the offending structure. *See, e.g., Holyoke Co. v. Lyman*, 82 U.S. 500,

509 (1872) (describing 1866 Massachusetts statute authorizing state fisheries commissioners to examine dams, determine the fishways that should be constructed, and, if the dam owner refused to agree to the remediation plan, authorize the commissioners to make physical modifications and charge the cost to the owner).

Thus, the supposedly "extraordinary" action of the lower federal courts in demanding that the State remove its obstructions from waterways within the ceded territory, is no different than the result that would lie at common law. *Accord* Resp. Br. at 34-35. Further, while the State claims that equitable relief is not proper because the federal government approved its culverts when they were constructed, this same argument routinely failed at common law. Courts repeatedly rejected defenses by mill owners that they had been authorized to construct their obstruction by a royal grant (in England) or a legislative act (in the United States). *See, e.g.*, *Stoughton v. Baker*, 4 Mass. 522 (1808) (holding authorization to create a dam did not preclude the more recently created fishery committee from ordering modifications to provide for fish passage). Although the criteria for determining whether a particular weir, mill or dam violated the prohibition on obstructions varied from jurisdiction to jurisdiction, none of the tests appear to have been "unworkable," nor did they produce a floodgate of litigation. *See, e.g.*, *Summers v. People*, 29 Ill. App. 170, 172 (Ill. Ct. App. 1888) (precluding any obstruction that "substantially and materially interferes" with fish passage).

The Tribes have a federally protected treaty right, not one based on the vagaries of State common law. *Winans*, 198 U.S. at 380. But surely the treaty right of taking fish contains at least the protections against direct obstructions of waterways that the common law rights in a fishery would include. When the treaty was negotiated and signed, those rights prevented blocking fish passage as the State's culverts do here.

ARGUMENT

I. THE COMMON LAW PROTECTED FISHERIES FROM OBSTRUCTIONS THAT IMPEDED FISH PASSAGE

A. Fishery Rights Like Those Guaranteed by the Tribes' Treaties Were Well-Established at Common Law

The common law recognized both public and private fisheries. Joseph Chitty, *A Treatise on the Game Laws and on Fisheries* 239 (2d ed. 1826). Public fisheries existed in the ocean and on navigable waters, the latter of which were defined to include all waterways that were "arms of the sea" because they were subject to the ebb and flow of the tide. Chitty, *supra*, at 239, 269, 276. Private fisheries existed in non-navigable rivers, lakes and streams.

In the ocean and other navigable waters, while the king was entitled to take certain species denominated "royal fish" (e.g., whales and sturgeon), the privilege of fishing for other species belonged to all British subjects in common. Woolrych, *supra*, at 92, 98-99. *See also* Henry Schultes, *An Essay on Aquatic Rights* 4-5, 10, 13, 15, 17 (1831) (discussing the development of these principles from Roman law to the early English

common law scholars). In waters that were not navigable, however, the presumption was that the public had no right to fish there. Instead, the owners of the riparian lands owned the fishery. Chitty, *supra*, at 276-77. If one person owned both sides of a non-navigable river, he would acquire the exclusive right of fishing in the waters between. Otherwise, a riparian owner gained the right to fish to the middle of the waterway. *Id.* at 276-77; Archibald Brown, *Scriven on Copyholds* 243 (6th ed. 1882); Woolrych, *supra*, at 30, 124.

These default rules could be modified by obtaining rights in a fishery through royal grant (i.e., franchise), private grant, custom, or prescription. Woolrych, *supra*, at 30, 91, 92, 139, 141. The extent to which these rules could be used to modify the rights in public fisheries, however, was hotly debated. Scholars disagreed about whether the public's rights in navigable waters could be abrogated through royal grant. *See* Schultes, *supra*, at 4-18, 68-69, 80 (arguing that the king could only grant an exclusive franchise in navigable waters for royal fish). And while some scholars claimed that a person could obtain an exclusive private fishery in navigable waters through prescription after 20 years, others argued that public fisheries could not be appropriated by individuals in this manner. *Compare see* Henry Roscoe, 1 *A Treatise on the Law of Actions Relating to Real Property* 372 (1825), *with Scriven on Copyholds*, *supra*, at 242. *See also* Schultes, *supra*, at 4, 10 (noting that under Roman law, public rights were "incapable of individual exclusive appropriation").

Because grants, custom and prescription could modify the rights to private fisheries, and potentially public fisheries (subject to the above limitations), courts and scholars referred to the resulting fisheries as "territorial fisheries," "several fisheries," "free fisheries," "common fisheries," and "commons of piscary." Woolrych, *supra*, at 30, 123-24. Unfortunately, there was never complete agreement on the definition of each of these terms, which overlapped. Chitty, *supra*, at 280-81 (noting that "[f]rom the earliest cases that can be found upon this subject, the distinctions between these various fisheries seem to have been much disputed"); William Blackstone 2(2) *Commentaries on the Laws of England* 40 (claiming that there were three different types of fisheries, and "the rights and distinctions [of these fisheries is] . . . very much confounded in our law-books"); Schultes, *supra*, at 32-33 (claiming that there were four different types of fisheries and "a considerable contrariety of sentiment has prevailed in regard to their distinct definitions").

Regardless of the nuances, most courts and scholars agreed that a "several fishery" was an exclusive right to take fish within an area.[4] Woolrych, *supra*, at 126,

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[4] Differences arose as to whether the possessor of a several fishery was required to be a riparian landowner. For example, Blackstone believed that a several fishery was the exclusive right of fishing possessed by a riparian landowner, and that a free fishery was the exclusive right of fishing in public waters, pursuant to a royal franchise. Blackstone, *supra*, at 39-40. But Schultes believed that a several fishery was an exclusive right to fish, and that while this right could not exist in navigable waterways, in private waters, it was not limited to riparian landowners. Schultes, *supra*, at 33, 36, 44, 85.

134, 137; Chitty, *supra*, at 281-83, 303. This was in contrast with a "common of piscary," which was a type of profit-a-prendre – a non-exclusive right to take fish in a private waterway, typically as a non-riparian landowner. Blackstone, 2(2), *supra*, at 30 (noting that a "common of piscary is a liberty of fishing in another man's water" and discussing other profits such as the common of turbary (turf), and estover (fallen wood)); John Edward Hall, *A Treatise on the Law Relating to Profits A Prendre and Rights of Common* 307 (1871). *Cf.* George Wingrove Cooke, *A Treatise on the Law of Rights of Commons* 7, 37 (1856) (concluding that a common of piscary could, like other profits, be appurtenant (benefiting and transferring with land) or in gross (benefiting a person)). Definitions of a "free fishery" were more disparate. *Compare* Schultes, *supra*, at 61-62 (concluding that a free fishery was synonymous with a common of fishery; it was a non-exclusive right to fish in navigable and non-navigable waters), *with* Blackstone, *supra*, at 39 (asserting that a free fishery was the exclusive right of fishing in a public river and was also known as a royal franchise).

The rights belonging to the Tribes bear hallmarks of several of these common law fisheries, a fact glossed over by amici curiae AWB in its brief discussion of the common law. AWB Br. at 10-11. For example, as the former owners of riparian land on both sides of non-navigable waterways, the Tribes, under a common law regime, would have originally possessed an exclusive several fishery. In their treaties, the Tribes retained the right to take fish at all of their "usual and accustomed fishing places," but they did so "in common with the citizens of the territory." Therefore, the Tribes' rights bear some resemblance to both a free

fishery and a common of piscary. But neither of these categories fits precisely, because as this Court has previously held, the Tribes did not simply retain the right to compete equally with other fisherman. Their treaties guarantee tribal members the right to take up to one half of the harvestable fish at their traditional fishing locations. *Fishing Vessel*, 433 U.S. at 684-87.

Regardless, the precise categorization of these Tribal rights would not have mattered at common law. Whatever their characterization, the Tribes' rights would have been understood as valuable property interests, entitled to protection from interference. In particular, as discussed in the next section, obstructions that blocked fish passage to any of those fisheries were prohibited.

B. Obstructions to Fish Passage Were Prohibited at Common Law

At common law, obstructions in navigable waterways were considered "purprestures," or public nuisances. This rule was originally developed, in part, because obstructions hindered navigation, and historically, rivers were the equivalent of today's highways. But obstructions were also prohibited if they impeded the passage of fish upstream. Chitty explains the reasoning behind this rule as follows:

> Public fisheries, as a matter of national concern, are of great importance, since they are not only the source of considerable sustenance for the population of the country, but constitute a nursery for our seamen. We therefore find that the common law has, in various instances, particularly protected such fisheries . . .

Chitty, *supra*, at 239. Woolyrch agreed in particularly strong language: "[T]he erection of wears, so as to injure the fish, is a public nuisance, it is itself illegal, and against the rules of the common law; and no length of time will legitimate or sanction the continuance of such an obstruction." Woolrych, *supra*, at 217.

This rule was so strong, that "[n]ot even a legal grant by the Crown can make a nuisance of this kind [obstructing a public waterway] legitimate. The right of the public is paramount." Woolrych, *supra*, at 194. For example, in *Williams v. Wilcox*, 8 Ad. & E. 315 (1838), the plaintiff brought a trespass action against the defendant, who had torn down a weir appurtenant to the plaintiff's fishery. The plaintiff, similar to the Petitioners here, claimed that his weir was legal because the Crown had granted his predecessors in interest the right to erect it generations ago. Additionally, at the time of its original construction, the weir blocked only part of the river; it was only much later, when the river changed course and became congested with debris, that passage was completely obstructed.

The court rejected this defense, noting that such obstructions were always nuisances:

> It is difficult, therefore, to see how any such grant made in derogation of the public right previously existing, and in direct opposition to that duty, which the law casts on the Crown, of reforming and punishing all nuisances which obstruct the navigation of public rivers, could have been in its inception valid at common law. . . . We are, therefore, of opinion that the legality of this weir cannot be sustained on the

> supposition of any power existing by law in the Crown in the time of Edward I, which is now taken away.

Wilcox, 8 Ad. & E. at 333-34.[5]

Obstructions to fish passage were not only protected by common law nuisance actions, but by legislation. The Magna Carta provided "that all weirs from henceforth shall be utterly pulled down by Thames and Medway, and through all England except by the sea-coast." Chitty, *supra*, at 246, 351. Lord Coke and others interpreted this provision to require that the owners of river banks keep the rivers open for both navigation and fish. *Id.* at 246.

The Magna Carta was followed by a long series of statutes that treated obstructions to waterways as public nuisances, forbidding the erection of new weirs, and the enhancing or enlarging of those which had existed prior to its adoption. Chitty, *supra*, at 248, 249 (discussing various acts); Woolrych, *supra*, at 193 (same). For example, a 1393 statute granted the citizens of London the right to "remove and take away all the weirs in the waters of the Thames and Medway" to ensure safe fish passage. Chitty, *supra*, at 372-73. Similarly, a law enacted during the reign of Edward IV declared that mill dams and other obstructions "had

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[5] Ultimately, however, the court sided with the plaintiff in *Wilcox* because it concluded that balance struck in the Magna Carta provided that all obstructions erected prior to its adoption in 1215 A.D., would be permitted to continue in their present form, even as new barriers were prohibited. Protection for these ancient obstructions was a carefully constructed compromise, which ensured that all future weirs and dams would guarantee the free passage of fish. *Wilcox*, 8 Ad. & E. at 335-36.

been enhanced, levied, and enlarged, so as to destroy the fish, and endanger the navigation," and so a penalty of one hundred marks was applied to offenders for every month that such obstructions remained unrectified. Woolrych, *supra*, at 193.

Later, Parliament enacted statutes that prohibited dams, steps, mills and other obstructions unless their design was approved by designated persons or committees, which were charged with ensuing proper fish passage. For example, the commissioners of sewers had authority, under certain circumstances, to abate mills, mill stanks and other obstructions by virtue of the powers extended to them by the statute of sewers. Woolrych, *supra*, at 243; *see also* Blackstone, *supra*, at 39, n.13 (discussing 1785 act preventing the erection hedges, stone steps, mills and other obstructions in waterways, except if leave was given by the court "under such conditions for preventing the obstruction of fish passage and ordinary navigation"). These laws were enacted with particular regard to the life cycle of salmon and other anadromous fish. Woolrych, for example, discusses a statute that required all mill-owners to keep open a sufficient space "for the salmon to pass and repass freely up and down the said rivers" between November and May of each year. Woolrych, *supra*, at 173.

Those blocking fish passage were liable in civil and criminal proceedings and were often required to modify the structure or have it torn down. Woolrych, *surpa*, at 228-30. The public itself had a "right to remove obstructions which impede the enjoyment of their common privileges" so long as they could do so without breach of the peace. Woolrych, *supra*, at 222. The

court also could order that structures preventing fish passage, such as those "prevent[ing] salmon from coming up river to spawn" be "cut and destroyed . . . and demolished." *Id.* at 222-23.

These rules prohibiting obstructions were not limited to navigable waters. Private fisheries were also to remain unobstructed under English common law. For example, Woolrych states that "the possessor of such a [private fishery] right cannot use it to the detriment of his neighbor." Woolrych, *supra*, at 30-31. Individuals who owned an interest in a private fishery (e.g., several fishery, common of piscary), through riparian land ownership, grant, custom, or prescription, possessed several remedies against persons who placed obstructions in the water that impeded fish passage.

The prohibition on obstructions of non-navigable waterways was discussed at length in the oft-cited case of *Weld v. Hornby*, 103 Eng. Rep. 75, 7 East 196 (K.B. 1806). In *Weld*, the plaintiff possessed private fishing interests for the past several decades in parts of the Ribble River. The defendant's predecessors had erected a weir across the river near their mill under authority of deeds that were more than 200 years old. Prior to 1766, however, the weir was constructed entirely of brushwood. After that date, the owner of the mill erected a solid stone weir across two-thirds of the river, leaving the other one third composed of brushwood. None of the upstream fishery owners made an objection to this change. Then in 1784, the defendant removed the remaining third of the brushwood weir and extended the stone weir completely across the river. Nearly 20 years later, the plaintiff filed suit, arguing

that the weir almost completely blocked the passage of fish and was therefore a nuisance. The jury concluded that the weir was prejudicial to the plaintiff, but it found for the defendant based on the length of time that the weir had existed. The court set aside that jury verdict, however, holding that the weir constituted a public nuisance.[6]

The same rules appear to have existed throughout the United Kingdom. In an early Irish case, for example, an individual who obstructed the river Bann with weirs and traps made of wood, stone, and other substances, was charged with trespass. *Hamilton v. Marquis of Donegall*, 3 Ridgeway's Parl Cases 267, 268 (Ire. 1795). The river was 158 feet wide, and the

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[6] This prohibition against obstructions to waterways is analogous to such prohibitions for land-based easements. The typical common law rule prevented a landowner from erecting an obstruction within the easement of another. For example, in *The King v. Ward*, 4 Ad. & E. 335 (1836), the defendant erected a causeway to make it easier for ship passengers to embark and disembark ships. But the causeway partially obstructed the Medina River, and the causeway builder was charged with criminal negligence. The builder argued that the inconvenience of the obstruction was justified by the resulting public benefit, but the court rejected his argument as irrelevant and found him guilty.

In doing so, the *Ward* court analogized to other cases, both real and hypothetical, involving obstructions of easements. For example, the court stated that a properly constructed hoard (a temporary solid structure at a construction site that prevents unauthorized access) erected in a street while building repairs were ongoing, would not create nuisance liability, because it "was placed for the safety of those possessing the right of way: it protects them from inevitable danger" while still "leav[ing] them a free passage, and sends them another way if the whole street is necessarily obstructed." *Id.* at 405. On the other hand, "[a] permanent hoard would be abatable as a nuisance." *Id.*

defendant's obstructions occupied just 48 feet. *Id.* at 286. Statutes required only 21-foot openings in rivers to allow for boat and fish passage, and the defendant argued that, as a result, no error had been committed. *Id.* But the plaintiff claimed that the common law still compelled liability for obstructing the river, because those portions of the river that were not occupied by the defendant's structures developed currents that were too fast for the salmon, trout and other fish to migrate. *Id.* at 286-87. As a result, fish were prevented from swimming upstream to the plaintiff's fishery. *Id.* at 269, 281.

The jury found for the plaintiff, and the defendant appealed to the Court of Exchequer and the House of Lords, both of which affirmed the jury verdict. *Id.* at 328. Woolrych summarized the latter decision in his famous treatise as concluding that the "owner of the lower fishery [could not] make such an alteration in the stream, the common medium of both fisheries, as to destroy the rights of the upper one," "[f]or it was not competent to the plaintiff in error to alter the condition of the fishery, nor to obstruct the passage of fish from the sea into the plaintiff's fishery in any manner not essentially necessary to enable her to exercise her right of catching fish, in their passage up the river." Woolrych, *supra*, at 230.

The law was similar in Scotland. As in England, Parliament acted early on to prohibit obstructions to navigable waterways. For example, a statute enacted in 1318 provided "that all those who have cruives, fisheries, ponds or water-mills" in navigable waterways "where young salmon, smolts or the fry of other kinds of fish of the sea or fresh water descend and ascend,"

must position such machinery to ensure that "no fry of fish are impeded from ascending and descending."[7]

English precedent was also consonant with Scottish judicial decisions. For example, in *Viscount Arbuthnott v. Scott*, UKHL 4 Paton 337 (1802), upper riparian owners who held a several fishery along the North Esk River complained that a lower riparian property owner's dam dyke was obstructing the passage of fish. The structure was constructed without leaving any gaps, and the top of the dyke was very broad, completely dry, and of great height, leaving no possible chance of the fish swimming upstream except during floods. *Id.* at 341, 343. The appellants argued that this was a nuisance under the common law, because "the respondent can only exercise his own right of fishing in such a manner as not to injure the interests or rights of fishing of the upper heritors," yet his dam dyke was creating a "total obstruction to the passage of the fish." *Id.* at 341.

The House of Lords agreed with the appellants, concluding that "[t]he law, as to nuisances, must be the same in both countries" – England and Scotland. *Id.* at 343. Although the respondents had an easement, "it must be enjoyed and exercised so as not to prejudice other rights on the same river, emulously, negligently, or otherwise." *Id.* at 245. The respondents had violated that maxim here. *See also Bailie v. Lady*

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[7] The school of history at the University of St. Andrews has digitized *The Records of the Parliaments of Scotland to 1707* and has made this resource available on-line. This particular 1318 Act can be found at http://www.rps.ac.uk/search.php?action=print&id=304&filename=roberti_trans&type=trans (last visited Mar. 29, 2018).

Saltoun, 1821 Sess. Cas. 2016 (Scot. 2d Div), *reprinted* in Cases Decided in The Court of Session From May 12, 1821 to July 11, 1822, Vol. 1 216-17 (1834) (approving an action to enjoin a weir because it was weir "injurious to . . . his rights of fishing"). By 1869, Charles Stewart's *A Treatise on the Laws of Scotland Relating to Rights of Fishing* could declare confidently that all artificial structures "which form even a partial obstruction, or tend to frighten the fish, are illegal . . . and it is no defence to an action for the removal of such contrivances, that the right to use them has been expressly conveyed by grant, or that they have been in use for the prescriptive period, or for time immemorial." *Id.* at 167-68. *See also Countess Dowager of Seafield v. Kemp*, 36 S.L.R. 363 (S.C. 1899) ("Every proprietor of salmon-fishings is injured if the spawning beds are spoiled"); *Earl of Kintore v. Pirie*, UKHL 838, 839, 43 S.L.R. 838 (1906) (stating that no interference shall be made which materially obstructs the passage of fish").

The law was clear across the United Kingdom. No one could obstruct fish passage so as to interfere with a public or private fishing right. If they did, the obstacle must be modified or removed at the owner's expense.

II. U.S. STATES ADOPTED COMMON LAW PROHIBITIONS ON OBSTRUCTIONS TO FISH PASSAGE THROUGH CASELAW AND STATUTES

Early in U.S. history, the states adopted English common law on fisheries. Of course, some states made modifications to English law, especially to take into account the different geography in this country.[8] These modifications tended to be modest, however, producing only minor differences between U.S. and English law.

Importantly, English common law precluding the obstruction of fish passage in navigable and non-navigable waterways was almost universally adopted in the United States. Scholars and courts often stated that private parties could not exercise their rights in a manner that would cause "injury to the private rights of others," and therefore, "imped[ing] the passage of fish up the river by means of dams or other obstructions" was prohibited. Darius H. Pingrey, *Treatise on the Law of Real Property* 115 (1895); *see also* James Kent, 3 *Commentaries on American Law*, 411 (2d ed. 1832) (citing the English decision in *Weld*

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[8] For example, while many states retained the distinction found in England limiting public fishing rights to waterways that were affected by the ebb and flow of the tides, some states, such as Pennsylvania, decided to depart from English common law on this point and hold that public rights existed on all waterways that were navigable by boat, even if they were not affected by the tides. *Compare Adams v. Pease*, 2 Conn. 481, 482-84 (1818) (adopting the English common law test), *with Carson v. Blazer*, 2 Binn. 475, 477-78 (Pa. 1810) (expanding the common law test by finding that the public maintained fishing rights on inland rivers such as the Susquehanna, which were navigable by boat but not affected by the tides).

and noting that "[t]his right of fishery in rivers not navigable, is also subject to the qualification of not being so used as to injure the private rights of others; and it does not extend to impede the passage of fish up the river by means of dams or other obstructions"); J.B. Phear, *A Treatise on Rights of Water* 26-28 (1859) (citing decisions from the United Kingdom in *Weld* and *Marquis of Donegall* while noting that U.S. riparian landowners cannot "work any material injury to the rights of other proprietors above or below on the stream"); William Wait, 3 *A Treatise upon some of the General Principles of the Law* 363 (1885) (stating that a fishing right is "subject to the reasonable qualification of not being so used as to injure the private rights of others; and it does not, therefore, extend to impede the passage of fish up the river by means of dams or other obstructions"); Henry Philip Farnham, *Law of Waters and Water Rights* 1405-10 (1904) ("No riparian owner has a right to place an obstruction in a stream which will interfere with the passage of fish to land of owners living further up. And this rule applies to the erection of dams . . . [which] must contain ways through which the fish can pass").

The leading American treatise in this area of the law, Joseph K. Angell's *Treatise on the Law of Watercourses* (5th ed. 1854), explained:

> Even the exclusive right of fishery in rivers not navigable, is subject to a reasonable qualification, in order to protect the rights of others, who have a similar interest, but might lose all advantage from it, if their neighbors below them could with impunity wholly impede the passage of fish. The right of several fishery

> is clearly limited to the right of taking fish, and does not carry with it the right to hinder the passing of them above, and of preventing the suprariparian proprietors from enjoying a similar privilege.

Id. at 82-83.[9] *See also State v. Roberts*, 59 N.H. 256, 257 (1879) (noting that "while the riparian owner has the exclusive right of fishery upon his own land, he must so exercise that right as not to injure others in the enjoyment of a similar right upon their lands upon the stream above and below. He must not, by means of dams or other artificial obstructions, prevent the passage of fish up and down the stream, nor can a prescriptive right to maintain such obstructions be acquired in any of the waters of this state").

As in England, a public or private nuisance suit could be brought against persons who obstructed the passage of fish to upstream users. Additionally, just as England enacted statutes regulating obstructions of waterways, by the mid-1850s when the Stevens treaties were negotiated, more than a dozen states had passed legislation prohibiting obstructions in waterways that could impact fish passage including Connecticut,[10] Florida,[11] Georgia,[12] Kentucky,[13] Maine,[14]

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[9] As in England, this prohibition on obstructions of waterways is similar to the prohibition on such obstructions for easements in general. When an easement is present, the servient estate holder "may be enjoined from placing obstructions upon the way which materially interfere with the grantee's use of it." Leonard A. Jones, *A Treatise on the Law of Easements* 314 (1898).

[10] Act of Oct. 1785, 1785 Conn. Pub. Acts 330; Act of May 1798, 1798 Conn. Pub. Acts 488; *The Public Statute Laws of the State of Connecticut* 269 (Act of 1824 for encouraging and regulating

Massachusetts,[15] New Hampshire,[16] New York,[17] North

Fisheries), 278 (Act of 1824 in addition to an Act entitled "an Act for encouraging and regulating Fisheries"), 479 (An Act of 1838 to prevent and remove Nuisances in Highways, Rivers, and Watercourses) (John S. Boswell ed., 1839).

[11] Act of Feb. 10, 1832, Fla. Stat. Ann. § 861.02 (West 2017).

[12] Act of Feb. 15, 1799, 1799 Ga. Laws 141; Act of March 1, 1799, 1799 Ga. Laws 280; 2 *Historic Georgia Digests and Codes* 905 (Act of Dec. 15, 1809), 906 (Act of Dec. 18, 1816), 923 (Act of Dec. 9, 1824), 907 (Act of Dec. 18, 1824; Act of Dec. 24, 1825; Act of Dec. 22, 1829), 925 (Act of Dec. 26, 1835), 917 (Act of Dec. 28, 1836), 940 (Act of Dec. 21 1839), 919 (Act of Dec. 23, 1839), 936 (Act of Dec. 23, 1839), 914 (Act of Dec. 25, 1842), 930 (Act of Jan. 26, 1850) (Thomas R. R. Cobb ed., 1851).

[13] *Bibb v. Montjoy*, 5 Ky. 1 (2 Bibb.) 3–4 (1810) (discussing 1797 law requiring persons desiring to construct mill dams across waterways to receive approval for such dams to ensure no obstruction to fish passage); 2 *Statute Law of Kentucky* 948 (Act of Feb. 10, 1816) (William Littell & Jacob Swigert 1822); Act of February 27, 1849, 1849 Ky. Acts 37.

[14] *Peables v. Hannaford*, 18 Me. 106 (1841) (interpreting 1839 Act requiring fish committee to remove all incumbrances from certain waterways during spawning season, where fish run from May 5th through July 5th each year); *Bearce v. Fossett*, 34 Me. 575 (1852) (discussing 1789 and 1826 Acts mandating fish passage); Act of Feb. 28, 1821, 1874 Me. Laws 46; Act of Mar. 17, 1821, 1874 Me. Laws 84.

[15] I *Private and Special Statutes of the Commonwealth of Massachusetts* 272 (Act of Mar. 4, 1790) (Manning & Loring 1805); Act of Mar. 1, 1799, 1799 Mass. Acts 281; Act of Mar. 7, 1844, 1852 Mass. Acts 92, *reprinted in Laws relating to Inland Fisheries in Massachusetts* 229 (Wright & Potter 1887).

[16] *Little v. Perkins*, 3 N.H. 469 (1826) (discussing 1824 Act that prohibited dams from obstructing fish passage between May and October each year); Act of June 18, 1790, 1790 N.H. Laws 527, *reprinted in* 5 *Laws of New Hampshire* 527 (Henry Harrison Metcalfe ed., 1916).

Carolina,[18] Pennsylvania,[19] Rhode Island,[20] South Carolina,[21] Tennessee,[22] Vermont,[23] Virginia,[24] and Wisconsin.[25]

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[17] Act of Mar. 28, 1800, 1800 N.Y. Laws 522, *reprinted in Laws of the State of New York* (Loring Andrews ed., 1800).

[18] *Dunn v. Stone*, 4 N.C. 241 (1815) (discussing 1787 statutes requiring dams to leave one-quarter of width of rivers open for fish passage).

[19] *See* 8 *The Statutes At Large of Pennsylvania* 36 (Act of Mar. 9, 1771, ch. 627), 386 (Act of Jan. 22, 1774, ch. 642) (James T. Mitchell & Henry Flanders eds., 1902); Act of Apr. 15, 1835, 1836 Pa. Laws 138.

[20] *The Public Laws of the State of Rhode Island and Providence Plantations* 490 (Act of 1735), 494 (ACT OF 1779 & 1792), 496 (ACT OF 1736; 1743; 1798), 498 (Act of 1798), 499 (Act of 1798) (Carter & Wilkinson 1798).

[21] *Boatright*, 24 S.C.L. (Rice) at 451 (discussing 1827 law designed to prevent obstructions to the passage of fish up several rivers and appointing board of commissioners to ensure the same); *Tarrar & Miller v. Nunamaker*, 39 S.C.L. (5 Rich.) 484 (S.C. Ct. App. 1852) (same); 7 *The Statutes At Large of South Carolina* 531 (Act of Mar. 26, 1784) (David J. McCord ed., 1840); 5 *The Statutes at Large of South Carolina* 82 (Act of Feb. 29, 1788), 93 (Act of Nov. 4, 1788), 217 (Act of Dec. 21, 1792), 508 (Act of Dec. 19, 1805), 579 (Act of Dec. 15, 1808) (Thomas Cooper ed., 1839).

[22] 1 *Laws of the State of Tennessee* 384 (Act of 1787) (Edward Scott ed., 1821).

[23] *State v. Theriault*, 41 A. 1030 (Vt. 1898) (applying 1797 Act, which makes the erection of any artificial structure "whereby navigation or the passage of fish may be obstructed, a nuisance," and punishes the same); Act of Mar. 8, 1787, 1787 Vt. Acts & Resolves 72.

[24] Act of Oct. 1785, ch. LXXXII, 1785 Vt. Acts 62; 3 *Statutes at Large of Virginia* 409 (Act of Jan. 15, 1808) (Samuel Shepherd ed., 1836).

[25] An Act regulating fisheries, 1839 Wis. Sess. Laws 121.

The Territories of Oregon (from which the Washington Territory was separated out) and Washington, where treaties protecting the tribal right to "take fish at all usual and accustomed grounds and stations" were negotiated,[26] also prohibited persons from obstructing rivers in a manner that would impede fish passage. The Oregon Territorial Act adopted by Congress in 1848, provided as follows:

> That the rivers and streams of water in said Territory of Oregon in which salmon are found, or to which they resort, shall not be obstructed by dams or otherwise, unless such dams or obstructions are so constructed as to allow salmon to pass freely up and down such rivers and streams.

Act of Aug. 14, 1848, § 12, 9 Stat. 323, 328.

This provision was not in the original bill. Rather, it was added on the floor of the House at the request of Massachusetts Representative Joseph Grinnell. Grinnell was well acquainted with the drastic reductions in fish populations that could occur if waterway obstructions were not prohibited, as his own state had struggled with this issue for nearly a century. On the floor of Congress, the discussion was summarized as follows:

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[26] Tribal fishing rights were protected by federal law even prior to the negotiation and ratification of these treaties in the 1850s. For example, a December 23, 1844 act "[i]n relation to Indians" in the Oregon Territory provided "[t]hat the Indians shall be protected in the free use of . . . such fisheries as they have heretofore used." *Laws of a General and Local Nature Passed by the Legislative Committee and Legislative Assembly Collected and Published* 70 (1853).

> Mr. GRINNELL moved a new section, to come in between the 11th and 12th sections, providing that the rivers and streams in the Territory in which salmon are found shall not be obstructed by dams or otherwise unless so made as to allow said fish to pass freely.
>
> He said there was now a valuable fishery in Oregon, and unless some care was taken of it, it would be lost. For the want of care, by the erection of a dam, &c., in the Connecticut river, the salmon, which formerly had been very valuable there, had been driven out. This might be avoided in this Territory, with care, without expense.
>
> The amendment was agreed to.

Cong. Globe, 30th Cong., 1st Sess. 1020 (1848). This statement directly contradicts the claims of the Petitioner and its amici that salmon were considered "inexhaustible" at treaty times, and that neither treaty party could have envisioned a drastic reduction in their supply.[27]

The Territory of Washington was established in 1853. In the Washington Territorial Government Act

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[27] Federal negotiators surely knew that wildlife was not an inexhaustible resource. The fur trade had drastically reduced many species by the middle of the nineteenth century, and resource conflicts between Indian tribes and white settlers were already occurring. For example, in 1855, the same year that many of the Stevens Treaties were negotiated, the Mille Lacs Band in Minnesota was locked in a contentious dispute with lumberman who had erected a dam on the Rum River that was destroying the Tribe's wild rice beds. The Tribe actively asserted that their treaty rights precluded such obstructions. *See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 182 (1999).

of that same year, Congress provided that "legislation of Congress in reference to the Territory of Oregon," along with "legislative enactments of the Territory of Oregon" would apply within the Territory of Washington so long as they were "not inconsistent with, the provisions of this act." Act of Mar. 2, 1853, § 12, 10 Stat. 172, 177. As a result, the requirement that dams or other obstructions be constructed "to allow salmon to pass freely up and down such rivers and streams" was the law in the Territory of Washington from its very inception, including at the time the treaties in this case were negotiated. Act of Aug. 14, 1848, § 12, 9 Stat. 323, 328. Ultimately, the Washington Territory both explicitly received English common law and enacted its own prohibition on obstructing the passage of salmon during spawning season. *See Code of Washington 1881, available at* http://leg.wa.gov/CodeReviser/documents/sessionlaw/1881Code.pdf , Ch. 1, § 1 ("The common law of England, so far as it is not repugnant to, or inconsistent with the constitution and laws of the United States and the organic act and laws of Washington territory, shall be the rule of decision in all the courts of this territory") and Ch. 411, § 1173 (requiring any person who may build an obstruction in any river in the Territory to "construct a suitable fish way by which [salmon] may reach the water above said dam, or obstruction" and providing that any person who creates an obstruction that "may prove an absolute bar to the passage of fish frequenting the same for the purpose of spawning" may be fined or sentenced to up to one year in county jail).

By the end of the nineteenth century, this web of common law and statutory law had generated a robust

body of caselaw in the United States ensuring that waterway obstructions did not impede the passage of fish. Emory Washburn, *Treatise on the American Law of Easements and Servitudes* 330 (1863). Many of the cases litigated involved dams or mills that had been authorized by legislative acts, and years after their construction, the current owner was being pressed to alter that structure to ensure fish passage upstream. Courts consistently concluded that these obstructions created a nuisance.

For example, in *Stoughton v. Baker*, 4 Mass. 522 (1808), the Massachusetts Supreme Court held that the town of Dorchester, in authorizing the construction of a dam on the Neoponset River a century earlier, did not preclude its more recently created fishery committee from requiring modification to the dam to provide for fish passage. The court stated that:

> every owner of a watermill or dam holds it on the condition, or perhaps under the limitation, that a sufficient and reasonable passage-way shall be allowed for the fish. This limitation, being for the benefit of the public, is not extinguished by any inattention or neglect, in compelling the owner to comply with it. For no laches can be imputed to the government, and against it no time runs so as to bar its rights.

Id. at 528; *see also*, *State v. Franklin Falls*, 49 N.H. 240, 250 (1870) (holding that criminal indictment for maintaining a nuisance was proper where the defendant's dams obstructed the passage of fish, even though the dams were constructed more than 20 years ago); *Parker*, 111 Ill. at 586, 590 (concluding that dam, which was first built in 1836, modified with legislative

authorization, and had always obstructed the passage of fish, was required to be remediated because "[u]nder the common law, obstructions to the passage of fish were held to be public nuisances, and subject to legislative control"); *West Point Water Power & Land Imp. Co. v. State*, 66 N.W. 6, 7 (Ne. 1896) (enforcing state statute requiring artificial structures in waterways to be modified to create "a suitable and substantial fishway" even though the territorial legislature had previously authorized the defendant's milldam); *State v. Beardsley*, 79 N.W. 138, 140 (Iowa 1899) (requiring defendant to modify his dam constructed more than 20 years earlier, noting that "[t]he law seems to be . . . definitely settled in favor of the public, to protect fish, and provide for their passage along the streams, as well in unnavigable as in navigable waters")

As the preceding discussion establishes, when the Stevens treaties were being negotiated, obstructions to waterways that impeded the passage of fish were actionable public or private nuisances in both the United Kingdom and the United States. The federal drafters of the Stevens treaties would have fully understood this, and the words they chose prevent the State from blocking fish passage. In arguing that it may maintain barrier culverts that prevent anadromous fish from traveling from freshwater to sea and back, the State takes the untenable position that the treaties provide tribes with even fewer rights than those same words would provide at common law. This Court should reject such an unjust and narrow interpretation of these federally protected rights.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

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